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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 342

PATTIE L. HILLIARD,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

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To the Supreme Court of the State of Tennessee.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee rendered on May 5, 1961, in the case

there entitled PATTIE L. HILLIARD vs. STATE OF TENNESSEE.

OPINION BELOW

An opinion was entered by the Supreme Court of the State of Tennessee on May 5, 1961, and is printed in full in Appendix A. On May 15, 1961, the petitioner filed a petition to rehear with the Supreme Court of the State of Tennessee and the petition was denied on May 26, 1961. The court's denial of the petition to rehear is contained in Appendix B. Said judgment and opinion were rendered by the highest court of the State of Tennessee in which a decision could be made and became final on May 26, 1961, wherein the petitioner was sentenced to not more than three years in the state penitentiary.

JURISDICTION

The jurisdiction of this Court is invoked under 22 U. S. Code, Section 1257(3) and the Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

Was this petitioner deprived of rights guaranteed by the Fifth Amendment and the Fourteenth Amendments to the Constitution of the United States by means of the following proceedings in the courts of the State of Tennessee.

1. By the Supreme Court of Tennessee commenting upon the fact in its opinion dated May 5, 1961, that petitioner had not testified in the trial court?

2. Did the Supreme Court of the State of Tennessee deprive petitioner of her constitutional rights in considering petitioner's failure to testify in arriving at its

decision deny petitioner the due process of law under the Fourteenth Amendment to the Constitution of the United States and by the State Supreme Court imposing a sentence not authorized by statute and not imposed by the trial court.

3. Was petitioner deprived of her constitutional rights by being put to trial under a statute enacted by a constitutionally invalid legislature of the State of Tennessee?

CONSTITUTIONAL PROVISIONS INVOKED

The constitutional provisions invoked are Clause 1 of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;"

and the Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The petitioner was tried before a jury upon a charge of unlawfully and appropriating to her own use certain monies belonging to one Christine M. Baskin, under Section 39-4226 Tennessee Code Annotated, which is as follows:

> "'Fraudulent breach of trust' defined.—The fraudulent appropriation of personal property or money by any one to whom it has been delivered on deposit, pledge, sequestration, or to be carried or repaired, or in whose hands or under whose control it may be by his position as clerk, agent, factor, or bailee, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, is a fraudulent breach of trust. So is the fraudulent appropriation of certain specific property by any one to whom it had been delivered on contract of loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time, by a disposition not authorized by the contract."

The case proceeded to trial before a jury. On the trial of the case, two witnesses testified for the State, and the defendant being of the opinion that the State had failed to prove any offense, elected not to testify in her own behalf. The prosecuting attorney did not comment on this fact in his argument to the jury and the trial court properly charged the law on this question to the jury. The jury returned a verdict of guilty. An appeal was timely filed to the Supreme Court of the State of Tennessee.

Petitioner respectfully points out that the opinion of the Supreme Court of Tennessee is the first instance in the trial of her case where her constitutional rights were violated.

It is a too well settled proposition of constitutional law that a defendant may elect not to testify upon a trial to require citations here. None the less, the Supreme Court of the State of Tennessee commented upon this fact in its opinion and used this fact and circumstances in arriving at a decision adverse to the petitioner.

FEDERAL QUESTIONS IN THE COURT BELOW

Upon her petition to rehear, the petitioner contented that she was deprived of rights under the Fifth Amendment to the Constitution of the United States, and under the Fourteenth Amendment to the Constitution of the United States, on all three questions at issue.

The constitutional questions were presented in the Supreme Court of Tennessee in the petition to rehear as follows:

> "This Honorable Court in its opinion commented upon the fact that plaintiff-in-error had failed to testify in the court below. It is respectfully insisted that it was the plaintiff-in-error's constitutional right not to testify and that no unfavorable inference, finding of fact, or conclusion of law should be drawn therefrom. This action of the court deprived the plaintiff-in-error of due process of law and equal protection of the laws guaranteed to her by the Fourteenth Amendment to the Constitution of the United States."
>
> "The statute under which plaintiff-in-error was convicted is an invalid and void statute in that the legislature which enacted said statute was illegally constituted and convened in clear violation of the

constitutional mandate that the legislature reapportion itself each ten years, said statute having been enacted in 1955 and the legislature not having reapportioned itself since 1901."

REASONS FOR GRANTING WRIT

The questions presented in this petition involve serious and fundamental problems of administration of justice and of the rights of a defendant to elect not to give testimony in a criminal prosecution.

The additional question of indictment and trial under a statute enacted by an unconstitutionally apportioned legislature of a state is a new and novel question for determination by this Court. There is now pending in this Honorable Court in the case of Charles W. Baker, et al vs. Joseph C. Carr, et al, Docket No. 103 a direct attack upon the constitutionality of the legislature of the State of Tennessee as presently constituted.

The consideration and authority of this Court is needed as is evidenced by the instant case so that the individual may have a fair trial in a public tribunal free from any necessity of explaining or denying facts or circumstances which do not constitute an offense, and to prevent the conviction of any person under void, illegal, and unconstitutional statutes enacted by unlawfully constituted legislatures.

ARGUMENT

POINT NO. 1

Was petitioner deprived of rights guaranteed by the Fifth Amendment to the Constitution of the United States by reason of her election not to testify upon the trial of her case?

"An appeal in criminal cases is not a requisite of due process, and the matter of appeal is wholly one of discretion; but where an appeal is granted the proceedings in the appellate court must conform to the requirements of due process." 16A C.J.S. Page 688, Section 594. See also Brown vs. Allen, 73 Supreme Court 397.

Thus, it would appear that where petitioner was accorded the right to elect not to testify before the jury in the trial court and the trial judge was required to charge the jury that petitioner was wholly within her rights not to testify and that the jury should draw no inference unfavorable to petitioner by reason of her election not to testify, it follows, as a matter of course, that the Supreme Court of Tennessee was in error in sustaining a conviction upon the ground that the petitioner did not testify.

In the instant case, the State had wholly failed to make out a case and the petitioner should not have at any stage of the proceedings been required to testify or have her election not to testify considered in arriving at a decision in her case.

POINT NO. 2

Was petitioner deprived of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of Tennessee's erroneous comment upon the fact that she had failed to testify in the court below and by the

Supreme Court of Tennessee's imposition of a sentence and penalty greater than that imposed by the trial court?

The trial court in its original judgment dated March 11, 1960, transcript page 4, and in its order overruling petitioner's motion for a new trial dated June 17, 1960, transcript page 6, fixed her punishment at confinement in the State penitentiary for a period of not more than three years. The Supreme Court of Tennessee, however, in its judgment dated May 5, 1961, transcript pages 17 and 18, imposed an additional penalty upon petitioner as follows:

> "It is further ordered by the court that plaintiff-in-error be infamous and disqualified from holding any office under this State or electing the elective franchise."

The Supreme Court of Tennessee is a court for the review of errors and may not impose any new or different sentences.

Article 6, Section 2, of the Constitution of the State of Tennessee, is as follows:

> ". . . The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; . . ."

Section 40-2712 of the Tennessee Code, Annotated, is as follows:

> "Disfranchisement by conviction.—Upon conviction of the crimes of abusing a female child, arson and felonious burning, bigamy, burglary, felonious breaking and entering a dwelling house, felonious breaking into a business house, outhouse other than a dwelling house, bribery, buggery, counterfeiting, violating any of the laws to supress the same, forgery, incest, larceny, horse-stealing, perjury, robbery, receiving stolen property, rape, sodomy,

stealing bills of exchange or other valuable papers, subornation of perjury, and destroying a will, it shall be part of the judgment of the court that the defendant be infamous, and be disqualified to exercise the elective franchise and no person so convicted shall be disqualified to testify in any action, civil or criminal by reason of having been convicted for any one or more of the foregoing crimes may only be used as a reflection upon his credibility as a witness."

We respectfully point out that the list of crimes upon conviction of which a defendant is rendered infamous does not include the offense for which petitioner was convicted, and it was beyond the appellate power and authority of the Supreme Court of Tennessee to include a judgment of infamy in its final judgment. The case at bar is distinguished from the case of Davis vs. State, 85 Tenn. 522. In that case there was a general verdict on all counts of the indictment, including larceny. In the instant case, there was a specific verdict of not guilty as to the larceny count of the indictment. (Tr. p. 4). The judgment of infamy had not been rendered by the trial court and there is no statutory authority for the Supreme Court of Tennessee to impose such a sentence.

POINT NO. 3

Was petitioner deprived of her constitutional rights and denied the due process of law by being put to trial under a statute enacted by a constitutionally invalid legislature of the State of Tennessee?

The official Tennessee Code, which was enacted by the Seventy-ninth General Assembly of the State of Tennessee under Chapter VI of the Public Acts of 1955, is the authority under which Section 39-4226 was enacted.

Article 2, Section 3, of the Constitution of the State of Tennessee, provides as follows:

"The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people, who shall hold their office for two years from the day of the general election."

Article 2, Section 4, of the Constitution of the State of Tennessee is as follows:

"An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

Article 2, Section 5, of the Constitution of the State of Tennessee, is as follows:

"The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member."

Article 2, Section 6, of the Constitution of the State of Tennessee, is as follows:

"The number of Senators shall at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third of the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of

members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

There has been no apportionment as provided by the foregoing provisions of the Constitution of the State of Tennessee, and petitioner, therefore, alleges that the statute under which she was convicted, having been enacted in 1955, is a void statute.

Petitioner would further point out that the statute under which she is convicted is in derogation of the common law; is not a common law offense; and, therefore, must be strictly and technically construed against the State of Tennessee.

Petitioner further avers that this is in all respects a violation of her constitutional rights to be tried under a validly enacted statute of the State of Tennessee.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorary should be granted and the Supreme Court of the State of Tennessee summarily reversed.

Respectfully submitted,

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E. C. YOKLEY,
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Attorneys for Petitioner.

Dated August 21, 1961.

Certificate of Service

I, R. C. Boyce, Jr., attorney for petitioner herein, hereby certify that copies of the foregoing petition for certiorari and appendices were this day served on adverse party herein in accordance with Supreme Court Rules 21 (1) and 33 by depositing the same in the United States Post Office at Nashville, Tennessee, with first class postage prepaid addressed to counsel of record at his post office address, as follows:

George A. McCanless, Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee.

August 21, 1961

R. C. Boyce, Jr.

APPENDIX A.

Miss Pattie Hilliard,
Plaintiff in Error,

vs.

The State,
Defendant in Error.

From the Criminal Court of Davidson County.

Hon. Chester K. Hart, Sitting by Designation of the Chief Justice, Judge

Affirmed

Opinion Filed May 5, 1961

For Plaintiff in Error:

E. C. Yokley
Robert C. Boyce, Jr.
Jack Norman
Nashville, Tennessee

For The State:

Walker T. Tipton
Assistant Attorney General

Opinion

(Filed May 5, 1961, B. J. Boyd, Clerk, Supreme Court.)

Plaintiff in error, Miss Pattie Hilliard, hereinafter referred to as defendant, was indicted on a two-count indictment for (1) fraudulent breach of trust and (2) larceny. She was acquitted of the charge of larceny but was convicted for the other offense and sentenced to a maximum of 3 years in the State Penitentiary, from which appeal has been perfected and briefed.

The assignments of error may be summarized into three propositions:

1. That the evidence preponderates against the correctness of the judgment and the evidence does not make out a case against the defendant.

2. The court erred in not charging the jury on circumstantial evidence.

3. The prejudicial admission in evidence of the testimony of the Deputy County Register and the Deputy Clerk and Master of the Chancery Court, which will be referred to hereinafter in detail.

Before reciting the material evidence in support of the verdict of the jury, it should be stated first that only two witnesses testified with regard to the transaction and the defendant did not take the stand in her own behalf. It was the insistence of the State, of course, that the defendant was guilty of either one or the other of the two offenses charged, whereas the defendant's insistence was that the evidence did not show the commission of either offense but showed merely a transaction amounting to simply a loan of money by the complaining party to the defendant.

Miss Christine Baskin, who had been employed 19 years as a secretary in the Veterans' Administration Nashville Office, was resisting the attempt of the Government to enforce her retirement. She and the defendant had no previous personal acquaintance but Miss Baskin was made cognizant of the fact that defendant was a practising attorney in Nashville and she was referred to her as one who knew Civil Service regulations. She got in touch with defendant on the night of June 24, 1957, by telephone about 8:00 o'clock and following this conversation, she took a taxicab out to the home of defendant where they discussed her legal problem for something over an hour and then about 10:30 the defendant switched the conversation to the question directed to Miss Baskin as to whether she owned any securities. She replied that she had some Government Bonds amounting to something over $5,000 and some shares in a Credit Union. Whereupon defendant said, "Oh, you are not making any-

thing on Government Bonds. You turn those securities over to me and I can invest it for you where you will earn more compensation and help you. You don't have anything to worry about. You are going to be better off than you ever were in your life. I am going to see to that."

At about 11:00 P. M. when she suggested that it was time for her to go home, defendant then invited her to spend the night with her, which she did. Next morning when she suggested going home, defendant suggested that she ride out with her to interview a witness, which was done, and then the two of them drove uptown and parked on the Tulane Hotel Parking Lot, where defendant remained in the car at her own suggestion and Miss Baskin went to the bank and converted her bonds into cash and received a Cashier's check for $5,208.21. Then they drove to the office of the Credit Union, where Miss Baskin says when she was directed to go in and cash her shares there, she went in and requested same and she was told by the clerk who waited on her that she would lose her interest which was computed from the beginning of the year; that she then returned to the automobile and so informed defendant, whereupon defendant insisted that she go ahead and cash the same, which she did. They then went back to the defendant's apartment and there she indorsed in blank both checks for a total of $6,708.21 and delivered same to the defendant.

Miss Baskin testified further that at this point the defendant "did make out a memorandum receipt on a note form, a receipt showing that I had turned over the money, the amount I turned over to her." Further, "I want you to understand this is not a personal loan. I am investing your money so you can earn a larger rate of compensation. You are not making anything on Government Bonds." The defendant then told her

that she needed a boost in her morale and so she dropped her by a beauty parlor and left her there and she did not see her until the next day when the defendant took her to see some doctors in connection with her retirement problem.

Shortly thereafter she became suspicious of the defendant because the defendant told her to put that note receipt away in her lock box at the bank and not tell anybody about it. She then consulted some official at the First American National Bank who dictated the form of letter which she took down in shorthand and then wrote and mailed to the defendant, which letter is dated July 8, 1957, and read as follows:

> "I have been worrying about the money I lent you on June 25, 1957, and which I hold your note for $6,708.21 due in 3 years. This note does not bear interest at 6% as you advised me, and I believe I would rather have this money invested in Government Bonds with interest at 3% rather than have a higher rate of interest on a note that is not secured.
>
> "Will you please make arrangements to return my money to me and I will return your note for $6-708.21."

Having heard nothing in response to said letter, she wrote a follow-up letter shortly thereafter using similar terms to those in the first letter. Having obtained no results from either letter, she had the defendant come to her apartment and there in the presence of a friend of the witness, Miss Mary Compton, she stated to the defendant that the paperwriting, as she called it, the note receipt, was no security and stated to her that she had promised to invest the money in safe securities, to which defendant replied, "Well, I'll put 6% on it," and then she wrote 6% on the paper. Miss Baskin then said, "That still isn't what I want." Defendant

replied, "Well, I'll secure it by my home out on West End." Then the witness said, "Still that isn't what I want: I want security. I want you to show me bonds that you invested that like you said you were going to do in first mortgage real estate".

Both Miss Baskin and Miss Compton testified that when Miss Baskin stated to the defendant that she had said she was going to invest the money in first mortgage real estate bonds the defendant replied, "Yes, I know I told you that. I know I told you that." Nothing happened until a few days thereafter Miss Baskin found that someone had shoved under her apartment door a new note in the same amount and a deed of trust on the above mentioned residence. This trust deed contained a statement that the property was unencumbered. It later developed that this was not true and that the several liens of deeds of trust and court judgment liens in a large total amount were existing liens of records at the time this deed of trust was given.

Shortly thereafter Miss Baskin consulted an attorney and subsequently this trust deed was filed for record on September 4, 1957, and when bankruptcy proceedings were commenced against the defendant, on the advice of Miss Baskin's counsel, a claim was filed as a creditor in the bankruptcy proceeding.

Miss Compton was present when the defendant arrived at Miss Baskin's apartment on the occasion of their last meeting referred to above (R. 28, 43). Miss Compton admitted that she had been called by Miss Baskin to come to the apartment and be present when the defendant arrived. The only thing further with regard to Miss Compton's testimony is that an effort was made to impeach her by prior inconsistent statements but she denied making such inconsistent statements and, of course, that was a matter for the jury.

Under the foregoing evidence and in view of TCA

39-4227, which points out the distinction between a breach of trust and larceny, the jury had to take its choice, so far as finding the defendant guilty of any crime, between the offenses charged in the two counts of the indictment. That statute, first paragraph, reads as follows:

> "The two cases of breaches of trust specified in Sec. 39-4226, refer to a receiving with intent to comply with the contract under which the delivery is made, and a subsequent determination of fraud. If the contract be used merely as the means of procuring possession, with an intent to make a fraudulent appropriation, it is larceny."

In view of the testimony to the effect that the defendant stated to Miss Baskin in the presence of Miss Compton and previous thereto that she had promised to invest this money in real estate bonds at 6% interest, the jury was warranted in finding that she was not guilty of larceny but was guilty of fraudulent breach of trust.

Then as between guilt or innocence, the jury had to decide whether in view of this documentary evidence the transaction was one of a loan of money to the defendant or was not a loan but was a trust instead.

It does not seem a difficult stretch of the mind to understand how the jury felt that this was not a simple loan transaction. The defendant is an experienced lawyer apparently, because she had a reputation along certainly this special line of Civil Service matters which caused someone else to recommend her to Miss Baskin and it must be presumed that if she had a license to practice law, she was familiar with the forms of commercial papers such as notes and deeds of trust, whereas there is nothing in the record to show that Miss Baskin was familiar with such—she was simply doing secretarial work in the Veterans' Administration

Office without any information in the record as to the particular nature of her work. Then it seems to us that the jury could very consistently feel that there was no reason why Miss Baskin should make a loan of her money to a perfect stranger, whereas she could entrust her attorney with a sum of money upon the thrilling prospect of the latter investing the same in securities that would yield twice as much income as she had been receiving theretofore particularly on her Government Bonds.

We are accordingly of opinion that there is no merit in the first proposition, supra.

Obviously the second proposition has no merit to it because this is not purely a circumstantial evidence case and, therefore, no duty rested upon the court of its own initiative to charge on circumstantial evidence in the absence of a special request by counsel.

Wooten v. State, 203 Tenn., 473.

The line of evidence referred to under proposition No. 3 is that of the Deputy Register and the Deputy Clerk and Master showing the several large encumbrances and several small ones against this piece of real estate described in the deed of trust executed by the defendant. It is insisted that this testimony was irrelevant and was prejudicial.

It was relevant in our opinion in any event on the charge in count 2 of larceny and hence being relevant, it was competent even if prejudicial.

All assignments of error are overruled and the judgment below affirmed.

(signed) John E. Swepston,
Justice

ALL CONCUR.

APPENDIX B.

Pattie L. Hilliard	
vs.	Davidson Criminal
State of Tennessee	

Opinion on Petition to Rehear

(Filed May 26, 1961,
B. J. Boyd, Clerk, Supreme Court.)

The first ground of the petition to rehear is that the judgment of the Court is contrary to the law and the facts of the case. The matters urged under this head are simply reargurnents of the facts of the case and do not comply with the rule of Court with regard to petitions to rehear and this ground is acccordingly overruled.

The second ground is that the Court commented on the fact that the plaintiff in error had failed to testify in the court below deprived her of her constitutional right not to testify and that no unfavorable inference could be drawn therefrom.

No question of due process of law or equal protection of the laws under the 4th and 5th Amendments or the 14th Amendment is involved in any way whatsoever. In the trial of a case before a jury, of course, there is the presumption of innocence with the burden on the State to prove guilt beyond a reasonable doubt and no comment can be made to the jury with reference to the failure of the accused to testify. On appeal, however, the plaintiff in error is under a presumption of guilt and the burden is on him or her to remove it. Actually the only thing this Court did before discussing the evidence was to make the statement that only two

witnesses testified and that the defendant did not take the stand in her own behalf. It was not only customary but necessary to make this statement, because the two witnesses testified for the State. The only evidence otherwise that might have been said to have been favorable on the face of the same was some documents. The testimony of these two witnesses contradicted the statements of those documents. This is what the Court had to consider in weighing the assignment of error that the evidence preponderated against the guilt and in favor of the innocence of the accused.

Turner v. State, 188 Tenn., 312, 322;
Smith v. State, ____ Tenn., ____,
327 S. W. (2d) 308.

Then again, it is quite usual to state in these opinions in criminal cases on appeal whether or not the plaintiff in error testified, because many rulings of evidence are determined upon the basis of whether or not he did so testify.

The third assignment relies upon the alleged invalidity of the statute under which the plaintiff in error was convicted, which statute it is alleged was enacted by a legislature that was illegally constituted for failure to reapportion itself since the year 1901: This assignment is overruled on the authority of Kidd v. McCanless, 200 Tenn., 273.

The fourth assignment is that the parol evidence rule was applicable to prohibit any testimony varying or contradicting in any way the terms of a valid written instrument.

It is a fundamental rule that this parol evidence rule, which is a rule of law and not of evidence, has no application whatever except between the parties to

the original instrument. Citation of authority is not necessary. It certainly has no application in a criminal case.

All grounds for the rehearing are overruled.

(signed) John E. Swepston,
Justice